STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 244316 Oakland Circuit Court
ELI SAMUEL PAYNE, Defendant-Appellant.	LC No. 2001-181555-FC

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to rob while armed. MCL 750.89. He was sentenced to thirty months to five years' imprisonment. Defendant appeals as of right, and we affirm.

The victim drove to a local gas station on October 2, 2001, in a Lincoln Town Car. After filling his car with gas, he proceeded to check the air pressure of his tires. While he was checking the pressure, he noticed three men in a white Chevrolet watching him. The vehicle was parked near the pump with the engine running. The car also drew the victim's attention because the engine was running "very loud." The victim went into the gas station to return the tire pressure gauge. As he walked out of the station, defendant and another man, Donnell Barclay, walked into the station. The victim entered his vehicle and drove out of the station. At that time, he noticed that there was no one sitting in the white Chevy. However, as he drove past, a head popped up in the driver's seat. The victim thought there were kids in the car playing hide and seek or another game.

The victim proceeded to drive home. After he turned into his subdivision, he saw a car turn behind him, but he did not "think anything of it." The victim pulled into his driveway. He could hear a car traveling very slowly and could hear voices. The victim immediately thought it was the same vehicle from the gas station because of the distinctive noise the car was making. The car drove past his home, then turned around in a nearby driveway, and stopped near his home. Barclay came out of the bushes and said to the victim, "Get in the car." The victim had a coffee mug in his hand. The victim asked Barclay to repeat what he was saying. He did this to "buy time." The victim wanted to obtain the keys to the white Chevy so that it could not be driven away. Barclay had pulled a gun at this point in time. The victim decided to "act like a lunatic" and ran toward the white Chevy, which was sitting in the street nearby with the passenger door open. The victim smashed the coffee mug into the windshield and then struck

defendant in the face with the coffee mug. Defendant was seated behind the steering wheel of the car. A third man, Sequoia Craig, had moved to the rear passenger seat of this four-door vehicle. The victim grabbed the keys to the car. Defendant shouted to the others that the victim had the keys, and all three men ran from the scene. The victim ran into his home and dialed 911. Police apprehended the three men involved in the altercation a short distance from the scene. Barclay had thrown the gun from his person during the flight, but police were able to recover the weapon.

Craig and defendant gave varying accounts[1] of the degree of knowledge defendant had that evening regarding Barclay's intent. Craig gave a statement to police indicating the men were originally parked at the Star Theatre in Southfield because Barclay needed money and wanted a nice car to sell. Craig testified that the men went from the theatre to the gas station where they observed the victim. Craig initially told police that defendant drove the vehicle from the gas station to the victim's home with knowledge of Barclay's intent. Craig later gave testimony at a preliminary examination indicating that he drove the vehicle from the gas station to the victim's home.

Defendant also gave inconsistent stories to the police. Initially, he indicated that he went into the gas station alone to purchase some gum. When he got into the vehicle, Barclay said, "Go" to Craig. Defendant only knew that they were traveling in a direction opposite from home. Later, he told police that he learned of Barclay's intent to obtain money or a vehicle about one mile before the incident. At trial, defendant testified that once they arrived at the victim's home, Barclay left the vehicle. Defendant was able to convince Craig to return to the vehicle, and defendant merely entered the driver's seat to leave the scene. He testified that he could not get the car started and ran from the scene instead. The prosecutor argued that defendant was an aider and abettor of Barclay, citing the victim's statement to police that the vehicle was running at the time of the altercation and that the passenger door was left open. The jury convicted defendant as charged.

Defendant first alleges that a new trial is warranted based on prosecutorial misconduct. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While the prosecutor may not make a statement of fact unsupported by the evidence, the prosecutor may argue the evidence and all reasonable inferences arising from the evidence as related to the theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Watson, supra*. To avoid forfeiture of an

[1] Craig was not charged with a crime at the time of trial. The prosecutor alleged that Craig's friendship with defendant caused him to change his story regarding defendant's knowledge.

unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Id*. Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id*.

Defendant alleges that the prosecutor committed misconduct by arguing to the jury that it should not follow defendant's "bunny trail" and referencing the veracity of witness Craig. We disagree. Review of the statements in context reveals that the prosecutor alleged that *the initial* statement of the many given by Craig to police provided the accurate account of the offense. The prosecutor alleged that the first statement was accurate because it was given before Craig had contact with defendant, his friend. The reference to the "bunny trail" also was responsive to defendant's testimony that he tried to leave the scene, despite the fact that earlier opportunities were available. The prosecutor need not present his argument in the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Accordingly, this claim of error is without merit.

Defendant also alleges that the prosecutor's inference that defendant had prior contacts with the criminal justice system constituted prosecutorial misconduct. In a related argument, defendant contends that trial counsel was ineffective for failing to object to this testimony. We disagree. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*.

Review of the record reveals that trial counsel purposefully did not object to the questioning regarding prior police contact. When direct examination began, defense counsel asked, "[P]rior to this event, have you ever been arrested for anything?" The prosecutor objected, alleging that the statement was designed to bolster the credibility of defendant, and the trial court sustained the objection. On cross-examination, when defendant tried to explain inconsistencies in his statements to various police officers based on fear, the prosecutor inquired whether he had any experience or prior "trouble" with crime. Defendant responded, "No, I'm not a crime person." Thus, the prosecutor elicited information that defendant initially tried to admit himself. Accordingly, we cannot conclude that trial counsel was ineffective on this record. *Knapp, supra*. Moreover, this questioning was responsive to defendant's explanation that he gave different stories to police based on fear. *Noble, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood